Supreme Court, U.S.
FILED

06-244 AUG 16 2006

OFFICE OF THE CLERK

(1)

No. _____

In The

Supreme Court of the United States

Walker

Plaintiff-Petitioner,

v.

Members of Congress, et al.

Defendants-Appellants

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BILL WALKER,
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QUESTION PRESENTED FOR REVIEW

Did the Appeals Court err in determining that the political question doctrine may be so construed by the courts as to allow Congress under that doctrine, to ignore, veto or otherwise thwart the specific language of the amendatory convention call contained in Article V of the Constitution, described by the Founding Fathers as "peremptory", such that the language may be ignored by Congress even when the state legislatures have applied in sufficient numeric count of applications to have satisfied the two-thirds requirement of the article thus compelling Congress, under the terms of the language of that article, to call a convention to propose amendments to the Constitution?

LIST OF ALL PARTIES TO THIS SUIT

The following in their official capacities (or their appointed or elected successors as specified in the original district court suit) are parties to this suit:

John W. Snow, Sec. of Treasury, Mark W. Everson, IRS Commissioner. Members of Congress, (unnamed), United States Senate, a unit of government and members of Congress, (unnamed), the House of Representatives, a unit of government.

CORPORATION DISCLOSURE STATEMENT

The Petitioner in this lawsuit is not a member of any corporation, public or private, nor does he own 10 per cent of stock in any corporation which in any way is a party to this suit.

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Other Authorities

ABA Constitutional Convention Report, August 1973;

A Lawful and Peaceful Revolution: Article V and Congress' Present Duty to Call a Convention for Proposing Amendments, Judge Bruce M. Van Sickle, Senior United States District Court Judge for the District of North Dakota, Hamline Law Review, Volume 14, Fall 1990;

1 Annuals of Congress 248 (J. Gales ed. 1789); Congressional Record, Volumes 33 (1899) to 135 (1989)....p. XVI, XIX

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Memorandum of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the District Court filed May 22, 2006. Not reported

Order of the Western District Court of Washington at Seattle dismissing suit filed November 12, 2004.

Order of Western District Court of Washington at Seattle, Walker v United States, filed March 19, 2001.

JURISDICTION

The order sought to be reviewed was filed in appeals court on May 22, 2006. The Court has jurisdiction of review under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The sole constitutional provision involved in this suit before the Court is Article V of the Constitution, the relevant portion of which reads:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or , *on the Application of the Legislatures of two thirds of the several States, shall a call a Convention for proposing Amendments,* which, in either Case. Shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress..." (Emphasis Added).

STATEMENT OF FACTS

Under Article V of the Constitution, the Congress of the Untied States is required to call a convention to propose amendments if two-thirds of the state legislatures apply for one. Article only requires that a numeric count, e.g., two-thirds of the state legislatures, must apply for a convention call. The text does not require that the applications be on the same subject nor does it give Congress in any way any discretion regarding such a call. (See above). All 50 states have submitted 567 applications for such a convention. Congress has refused to obey the Constitution and call such a conven-

tion. (Appendix, p. XVI). The Founding Fathers made it unambiguously clear as has this Court on four rulings that such a convention call was "peremptory" on the part of Congress. (See Appendix, p. X).

Even though same subject is not a constitutional requirement to cause a convention call, the amendment most sought by the states in their applications is the repeal of the 16th Amendment, creating federal income tax. A total of 39 states, one more than is required to ratify such an amendment, have applied for this amendment (Appendix, p. XIX).

Under federal income tax law, members of Congress can be held liable for violations of federal income tax (26 U.S.C. 3401(c)). 28 U.S.C. 2679(b)(1)(2)(A) provides that the usual immunity given members for performance of their officials does not apply if a civil action against that member is "brought for a violation of the Constitution of the United States or (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." Federal income tax law provides that it is unlawful that "[a]ny revenue officer or employee of the United States acting in connection with any revenue law of the United States who is guilty of any extortion...shall be dismissed from office or discharged from employment and upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both." (26 U.S.C. 7214 (a)(1)). It is well settled law that a person is guilty of extortion if he purposely obtains property, such as income tax, by withholding an official action. 28 U.S.C. 1346(a)(1)(2) provides for the recovery of any internal revenue tax that is "erroneously or illegally assessed or collected" and for a claim "founded ... upon the Constitution..." The refusal of members of Congress to obey the Constitution by refusing to issue a convention call, an official act, when mandated by the Constitution in order to prevent the passage of an amendment which eliminates the authority whereby income tax is obtained from the Petitioner is clearly

illegally collecting internal revenue by unconstitutional means and therefore makes the members liable for the above cited laws. In sum, refusal to call to prevent an amendment from occurring while still collecting income tax because the states wish to repeal that tax is extortion.

Further this refusal to call a convention by the members of Congress violates their oath of office required under 5 U.S.C 3331, 5 U.S.C. 3333 and this, in turn, violates 5 U.S.C. 7311 (1), 18 U.S.C. 1918 and Executive Order No. 10450 thus constituting overthrowing our constitutional form of government. There is only one constitutional means by which the *form* of government of the United States may be altered, by formal amendment to the Constitution as specified in Article V. Ignoring a clause of Article V so as to gain exclusive control of that process where the Founders never intended such control is an "alteration of the form of government the United States by unconstitutional means." Congress has never offered a formal amendment granting them exclusive control of the Constitution.

5 U.S.C. 7311 states the members even "advocate" i.e., declare their opposition to obeying the Constitution in a public record, that is sufficient to prove violation of their oath of office. By asserting their individual opposition to this suit in Appeals Court, by employing 2 U.S.C. 118, the members violated the above cited statutes. No statute provides no immunity for such public advocation. This Court has stated that no constitutional immunity exists for anyone who attempts to overthrow the constitutional form of government without amendment. This Court has stated:

"Since there is no constitutionally protected right to overthrow a government by force , violence, or illegal or unconstitutional means, no constitutional right is infringed by an oath to abide by the constitutional system in the future." Cole v Richardson, 405 U.S. 676 (1972).

Congress has never offered an amendment to the states giving it absolute power over the entire amendment process

nor allowing it to veto that process at its discretion. Therefore any such action on the part of Congress is unconstitutional.

Upon discovery of these facts, under 26 U.S.C 6501(a), 26 U.S.C. 7214 (a)(1), 26 U.S.C. 7422(a), 28 U.S.C. 1346 (a)(1)(2), 28 U.S.C. 2675(a), Petitioner requested reparation from the IRS the amount of $7333 of previously collected income tax. The IRS refused the requested reparation.

As required by law, Petitioner waited six months then brought his suit to district court. The district court dismissed his suit on the basis of lack of standing and political question doctrine allowing Congress to ignore or veto the text of the Constitution if it so desired. He appealed to the Ninth Circuit Court of Appeals which, in a two sentence Memorandum, affirmed the lower court's decision.

Petitioner now appeals to this Court for relief.

JURISDICTION OF COURT OF FIRST INSTANCE

The jurisdiction of the district court is granted under 28 U.S.C. 1331, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States"; 28 U.S.C. 1340, "The district courts shall have original jurisdiction of any civil actions arising under Act of Congress providing for internal revenue..."; 28 U.S.C. 1346 (1)(2), "The district courts shall have original jurisdiction.... of (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected...or sum alleged ... in any manner wrongfully collected under the internal-revenue laws; (2) Any other civil action or claim against the United States, not exceeding $10.000 in amount, founded either upon the Constitution, or any Act of Congress..."

The jurisdiction of the appeals court is granted under 28 U.S.C. 1291, "The courts of appeal...shall have jurisdiction of

appeals from all final decisions of the district courts of the United States..."

ADDITIONAL REASONS RELIED UPON FOR AFFIRMATION OF WRIT OF CERTIORARI

The single question before this Court is does Congress have to obey the original intent of the text of the Constitution and call an amendatory convention when the states have fulfilled the constitutional requirement specified in Article V. If the Court finds Congress does have to obey the original intent of the text, then it follows Petitioner is entitled to his reparation because the actions of Congress preventing an amendment to repeal a form of tax from occurring are in fact, unconstitutional. If however, as the two lower courts have ruled, the text of the Constitution is merely advisory and non-biding on the government, that is to say the government is not necessarily compelled to obey it and may ignore or veto it at its discretion, then Petitioner is not entitled to his reparation nor has any other offense, civil or criminal, been committed the government because the foundation upon which the authority of the law rests, the text of the constitution, can be vetoed. Thus, this simple single question resolves the entire issue before this Court.

The Founding Fathers were unambiguous regarding the meaning, intent, and written language of Article V. As stated in Federalist 85:

> "In opposition to the probability of subsequent amendments, it has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portion of the authority of which they were once possessed. For my own part I acknowledge a thorough conviction that any amendments which may, upon mature consideration, be thought useful, will be applicable to the organization of the government, not to the mass

> of its powers; and on this account alone, I think there is no weight in the observation just stated. ... But there is yet a further consideration, which proves beyond the possibility of a doubt, that the observation is futile. *It is this that the national rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan, Congress will be obliged 'on the application of the legislatures of two thirds of the states, which at present amount to nine, to call a convention for proposing amendments, which shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof.' The words of this article are peremptory. The Congress 'shall call a convention.' Nothing in this particular is left to the discretion of that body.* And of consequence, all the declamation about the disinclination to a change vanishes in air.
>
> If the foregoing argument is a fallacy, certain it is that I am myself deceived by it, for it is, in my conception, one of those rare instances in which a political truth can be brought to the test of a mathematical demonstration."

(Federalist 85, Alexander Hamilton, author.) (Footnotes omitted.) (Emphasis added.)

Alexander Hamilton chaired the Committee of Style during the 1787 Constitutional Convention. His committee's responsibility was to author the final written language of the Constitution reflecting the meaning and intent of the Founders. Thus, Hamilton can be viewed as the author of Article V. Hamilton's Federalist 85 text makes it clear the Founders did not intend the convention call to be "a political question" that was "the province of Congress" to decide. In sum, their interpretation was that upon the proper number of applying states, a call for a convention to propose amendments was

peremptory, obligatory, and non-discretionary on the part of Congress. Furthermore, the text makes it clear there is no other requirement in the meaning, intent, or written language of the Constitution for the states to satisfy, other than a two-thirds numeric count, in order to compel Congress to call a convention to propose amendments.

However it is obvious the two lower courts do not agree with this interpretation and it is up to this Court to make the final determination. Because of the absolute nature of the question, i.e.,. either a convention must be called or does not have to be, even a denial of this writ of certiorari will, in fact, become a ruling, the Court having sided with the lower courts' interpretation that under the political question doctrine, the government is free to ignore the direct text of the Constitution thus rendering the text advisory rather that peremptory in meaning.

Petitioner asserts that the appeals and district court erred in determining he had no standing. The federal statutes which provide authority for Petitioner to seek relief plainly confer standing to sue. Petitioner may seek in federal district court reparation for federal income tax collected in violation of the Constitution. Clearly, standing is conferred by the federal statute which allows for the reparation of the income tax: the amount reparation is concrete, individualized and particularized. The matter can be resolved by judicial decision and loss of income that otherwise would have happened proves injury of a specific rather than general nature. The law forbids the government from tax collection by unconstitutional means. Refusing to obey the Constitution in order to prevent the due process of an amendment proposal which would repeal the law under which the taxes were collected violates the constitution when that due process is "peremptory" rather than discretionary on the government.

Further, the Court has addressed the issue in *Flast v. Cohen* 392 U.S. 83 (1968) where the Court stated:

> "...[W]e hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power. Such an injury is appropriate for judicial redress and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing to secure judicial review."

One constitutional provision intended to restrict the exercise of the taxing and spending power (as well as any other action of Congress) is Article V. Therefore, where that article is thwarted in its process to regulate the taxing and spending power by the actions of Congress, such as in this instance refusing to call a convention to consider repeal of federal income tax, *Flast* clearly applies.

The political question doctrine invoked by the lower courts has nothing to do with standing. The ruling, if left intact, does permit the overthrow of our constitutional form of government. The Constitution provides for two methods of amendment proposal, not one and certainly not one entirely controlled by a single political body. As with the rest of the Constitution, the principle of separation of powers applies. If the writ of certiorari is denied will be in fact a ruling by the Court. The Court will have affirmed that text in the constitution can be vetoed by the government thus rendering all the language susceptible to such veto. Further, if the doctrine of *Coleman* of "exclusive" congressional control as reference by the courts is extended to the convention, then the entire amendment process is placed under the control of a single

political body which also has the power to ignore the text of the document. It will render the process "dead letter."

Hence, Congress can "amend" the Constitution anyway it pleases and cannot be reviewed by any court. Logically, as that court will have conceded that the basis on which the review is conducted, the text of the Constitution itself, can be ignored by that government it follows any ruling or review can be similarly ignored. The Court has in the past held the political question doctrine allows for a branch of government to execute a constitutional duty as opposed to another branch of government. It has never ruled that the doctrine grants veto power over that duty such that the branch of government can simply decide not to perform it or execute it where such discretion was not intended. Such discretion allows for "dead letter".

It is for this reason above all the Court must grant certiorari to prevent the creation of "dead letter" in the Constitution as well as the power of veto by the government the Constitution is supposed to regulate. If the Court denies certiorari then it will have affirmed the power of veto of the Constitution, something certainly never intended any of the Founders. The convention clause has never reviewed by the Court in its history and an interpretation of the text regarding a convention call is obviously needed to avoid a constitutional crisis which could ultimately overwhelm the entire Constitution. For if it is established the government does not have to obey the Constitution, what good is it? For these reasons Petitioner respectfully petitions the Court to grant his writ of certiorari.

APPENDIX

MEMORANDUM OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED MAY 22, 2006

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Bill Walker, Plaintiff- Petitioner, v.
Members of Congress of the United States,
as Individuals and in their Officials Capacities; et al.,
Defendants- Appellees

No. 05-35023

D.C. No. CV-04-01977 RSM

MEMORANDUM*

Appeal from the United States District Court for the Western District of Washington Ricardo S. Martinez, District Judge, Presiding

Submitted May 15, 2006**

Before: B. FLETCHER, TROTT and CALLAHAN, Circuit Judges.

Bill Walker appeals pro se the district court's judgment dismissing sua sponte for lack of jurisdiction his action alleging that the Members of Congress, the Treasury Secretary, and the Commissioner of Internal Revenue violated the

United States Constitution by failing to call a constitutional convention to consider repeal of the Sixteenth amendment. Walker sought to hold defendants both civilly and criminally liable, and also sought reparation of federal income taxes that had been "extorted" from him by defendants.

We agree with the district court's determination that it lacked jurisdiction over the action and affirm the dismissal for the reasons stated in the district court's order to show cause, filed on October 8, 2004.***

AFFIRMED.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** Walker's motion to strike the appellees' brief is denied.

****

WALKER V. MEMBERS OF CONGESS
DISTRICT COURT ORDER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BILL WALKER, Plaintiff,

v.

MEMBERS OF CONGRESS OF THE UNITED STATES et al.

CASE No. C04-1977RSM

ORDER OF DISMISSAL

III

On October 8, 2004 this Court order plaintiff to show cause on or before October 23, 2004, why this action should not be dismissed for lack of jurisdiction. Plaintiff timely responded to that Order, but his response wholly fails to cure the defects identified in the complaint. Moreover, his cause of action, although aimed at new defendants, duplicates an earlier case which this Court dismissed with prejudice. Walker v. United States, C00-2125C. The Court there stated that "It is unambiguously clear that the Court does not have subject matter jurisdiction in this case due to the fact that Plaintiff does not have standing to bring this suit and his complaint raises political questions that are more properly the province of Congress." C00-2125C, Dkt. #36 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) and other cases).

Accordingly this action is hereby DISMISSED for lack of jurisdiction. The thirteen motions filed by plaintiff, asking the Court to refer various matters to the United States Attorney General for prosecution, are all STRICKEN.

The Clerk shall enter judgment accordingly.

DATED this 12th day of November, 2004.

/S/ Ricardo S. Martinez, United States District Judge

****

As the District Court in Walker v. Members of Congress referred to Walker v. United States, that court order is provided for court examination.

WALKER v. UNITED STATES COURT ORDER

WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BILL WALKER, Plaintiff,

IV

v.

UNITED STATES OF AMERICA, Defendant

CASE NO. C00-2125C

ORDER

X Filed X Lodged X Entered
MAR 21 2001
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

Presently before the Court is Plaintiff's Motion Seeking Declaratory and Injunctive Relief in Finding Unconstitutional the Failure of Congress to Call a Convention to Propose Amendments Upon Receipt of Proper Number of Applications by the several States Prescribed in Article V of the United States Constitution. Defendant has made a Cross-Motion to Dismiss. Having reviewed each motion and responses on file, the Court denies Plaintiff's motion and grants Defendant's cross-motion for the following reasons.

Plaintiff initially filed a 781 page motion along with a motion for overlength brief. The Court denied the motion for overlength brief, and Plaintiff filed a shorter motion in accordance with the local rules of the Court. In accordance with the rules, once the decision was made to deny the overlength brief, the 781 page motion was no longer before the Court to consider. Only the shorter replacement brief could properly be considered by the Court.

Plaintiff's motion for declaratory and injunctive relief is essentially a request for the Court to order Congress to call a convention to propose amendments to the constitution in accordance with Article V of the United States Constitution.

V

Plaintiff, who is appearing pro se, states:

Article V provides a single numeric standard of two-thirds of the applying state legislatures, which then obligates Congress to call a convention. The obligation is non-discretionary. ... * The Congressional Record demonstrates all 50 states have submitted applications for a convention. There is no time limit set in Article V that the states must satisfy in their applications, nor does Article V permit recession of any application. Article V does not demand the applications deal with the same issue, nor does it establish any other requirement upon the legislatures other than a numeric count. As 50 states have submitted applications for a convention to propose amendments and as this exceeds the two-thirds requirement of Article V, the two-thirds requirement is thus satisfied. It was the clear intent of the Founding father that Congress have no discretion in the matter of calling a convention."

Plaintiff's Replacement Brief in Support of Motion seeking Declaratory and Injunctive Relief at 2 (citations omitted.)

Defendant properly filed its cross-motion to dismiss before filing any answer to Plaintiff's complaint, because it is for the Court to determine whether the Court has jurisdiction over the subject matter of the complaint before Defendant responds to the allegations in a complaint. It is unambiguously clear that the Court does not have subject matter jurisdiction in this case due to the fact that Plaintiff does not have standing to bring this suit and his complaint raises political questions that are more properly the province of Congress. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Baker v. Carr, 369 U.S. 186 (1962); Coleman v. Miller, 307 U.S. 433 (1939).

Therefore, Plaintiff's Motion seeking Declaratory and Injunctive Relief in Finding Unconstitutional the Failure of Congress to Call a Convention to Propose Amendments Upon Receipt of Proper Number of Applications by the Several States Prescribed in Article V of the United States Con-

stitution is hereby DENIED, and Defendant's Cross-Motion to Dismiss is hereby GRANTED. Plaintiff' Motion for Default Judgment is also DENIED.

The complaint is dismissed with prejudice since the Court finds that it would be futile to allow Plaintiff an opportunity to amend his complaint. The Clerk of the Court is direct to enter judgment accordingly.

DATED, March 19th, 2001.

S/John C. Coughenour
Chief United States District Judge
#####

*Judge Coughenour created an ellipse in quoting the plaintiff, omitting one sentence. The omitted sentence read: "This has been recognized by the Supreme Court in several cases." The sentence was footnoted as follows:

"*See generally* Dodge v. Woolsey 59 U.S. 331 (1855); Hawke v. Smith, 253 U.S. 221 (1920); Dillon v. Gloss, 256 U.S. 368 (1921); United States v. Sprague, 282 U.S. 716 (1931); Coleman v. Miller, 307 U.S. 433 (1939.)"

#####

Except for *Coleman* in his "province of Congress" statement, Judge Coughenour therefore deliberately ignored any Supreme Court rulings favoring the position that the Government must obey the Constitution as originally intended obviously interpreting *Coleman* as overturning these previous Supreme Court opinions. While *Coleman* does discuss the amendatory process it never mentions nor alludes to the amendment convention. Therefore, it must be assumed that *Coleman* was intended by the Court as dealing *exclusively* with the power of Congress to propose amendments not to control the entire process of amendment proposal and ratification to the point of veto.

VII

TEXT OF STATUTES RELEVANT TO THIS SUIT

2 U.S.C. 118: "In any action brought against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House, the United States attorney for the district within which the action is brought, on being thereto requested by the officer sued, shall enter an appearance in behalf of such officer..."

5 U.S.C. 3331: "An individual, except the President, elected or appointed to an office of honor or profit in the civil service...shall take the following oath: 'I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.'"

5 U.S.C. 3333: "...an individual who accepts office or employment in the Government of the United states...shall execute an affidavit within 60 days after accepting the office or employment that his acceptance and holding of the office or employment does not or will not violate section 7311 of this title. The affidavit is prima facie evidence that the acceptance and holding of office or employment by the affiant does not or will not violate section 7311 of this title."

5 U.S.C. 7311 (1): "An individual may not accept or hold a position in the Government of the United States of the government of the District of Columbia if he (1) advocates the overthrow of our constitutional form of government..."

18 U.S.C. 1918: "Whoever violates the provisions of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he (1) advocates the overthrow of our constitutional form of government;...

shall be fined under this title or imprisoned not more than one year and a day or both."

26 U.S.C. 3401(c): "For purposes of this chapter, the term 'employee' includes an officer, employee, or elected official of the United States."

26 U.S.C. 6501(a): "General rule. Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed..."

26 U.S.C. 7214(a)(1): "Unlawful acts of revenue of officers or agents. Any officer or employee of the United States acting in connection with any revenue law of the United States (1) who is guilty of any extortion or willful oppression under color of law... shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

26 U.S.C. 7422(a): "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected,...until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the secretary established in pursuance thereof."

28 U.S.C. 1346(a)(1)(2): "(a)The district courts shall have original jurisdiction, concurrent with the United states Court of Federal Claims, of: (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, ...or any sum alleged...in any manner wrongfully collected under the internal-revenue laws; (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Action of Congress..."

28 U.S.C. 2675(a): "An action shall not be instituted upon a claim against the United states for money damages

for injury or loss of property or personal injury...caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for the purposes of this section."

28 U.S.C. 2679(b)(1): "The remedy against the United States provided by sections 1345 (b) and 2672 of this title for injury or loss of property...arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office of any other civil action..."

28 U.S.C. 2679(2)(A)(B): "Paragraph (1) does not extend or apply to a civil action against and employee of the Government—(A) which is brought for a violation of the Constitution of the United States, or (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized."

Executive Order 10450 (in part): "Whereas the interest of the national security require that all persons privileged to be employed in...the Government shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States... it is hereby ordered as follows:

(a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment...of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(4) Advocacy of use of force or violence to overthrow

the government of the United States, or of the alteration of the form of the government of the United States by unconstitutional means."

SUPREME COURT RULINGS MANDATING A CONVENTION CALL BY CONGRESS

The Court has specifically addressed the obligatory nature of the convention clause in Article V in case. The interpretation was always the same: Congress must call. There has never been a single dissent on the Court in regards to this interpretation.

In *Dodge v. Woolsey* the Court stated:

> "The departments of the government are legislative, executive and judicial. They are coordinate in degree to the extent of the powers delegated to each of them. Each, in the exercise of its powers, is independent of the other, but all, rightfully done by either, is binding upon the others. The constitution is supreme over all of them, because the people who ratified it have made it so; consequently, any thing which may be done unauthorized by it is unlawful. ... It is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the congress of the United States, when two thirds of both houses shall propose them; *or where the legislatures of two thirds of the several States shall call a convention for proposing amendments*, which, in either case, become valid, to all intents and purposes, as a part of the constitution, when ratified by the legislatures of three fourths of the several States, or by

conventions in three fourths of them, as one or the other mode of ratification may be proposed by congress."

Dodge v. Woolsey, 59 U.S. 331 (1855.) (Footnotes Deleted.) (Emphasis added.)

In Hawke v. Smith, the Supreme Court said:

"The framers of the Constitution realized that it might in the progress of time and the development of new conditions require changes, and they intended to provide an orderly manner in which these could be accomplished; to that end they adopted the fifth article.

This article makes provision for the proposal of amendments either by two-thirds of both houses of Congress or *on application of the Legislatures of two-thirds of the states;* thus securing deliberation and consideration before any change can be proposed. ...

The fifth article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two method, by the action of the Legislatures of three-fourths of the states, or conventions in a like number of states. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. *The language of the article is plain, and admits no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed."*

Hawke v. Smith, 253 U.S. 221 (1920.) (Footnotes omitted.) (Emphasis added.)

In *Dillon v. Gloss*, the Court reaffirmed its previous interpretations of Article V saying:

> "An examination of article 5 discloses that it is intended to invest Congress with a wide range of power in proposing amendments. Passing a provision long since expired, it subjects this power to only two restrictions: one that the proposal shall have the approval of two-thirds of both houses, and the other excluding any amendment which will deprive any state, without its consent, of its equal suffrage in the senate. *A further mode of proposal – as yet never invoked – is provided, which is, that on the application of two thirds of the states Congress shall call convention for the purpose.*"

Dillon v. Gloss 256 U.S. 368 (1921.) (Footnotes omitted.) (Emphasis added.)

The final Supreme Court case is United States v. Sprague where the Court said:

> "The United States asserts that article 5 is clear in statement and in meaning, contains no ambiguity, and calls for no resort to rules of construction. A mere reading demonstrates that this is true. It provides two methods for proposing amendments. Congress may propose them by a vote of two-thirds of both houses, or, on the application of the legislatures of two-thirds of the States, must call a convention to propose them."

United States v. Sprague, 282 U.S. 716 (1931.) (Footnotes omitted.) (Emphasis added.)

These decisions obviously reinforce the interpretation of Article V expressed by Hamilton in Federalist 85.

More importantly, however, the timeline of these decisions indicates a significant fact: A clear interpretation of the action of Congress vis-à-vis the convention call was specified by the Court *prior* to there being sufficient states to compel

Congress to call a convention to propose amendments. After there were sufficient states applying to compel such a call, the Court addressed the matter in an identical fashion three more times. Congress ignored all rulings.

As to *Coleman v. Miller* 307 U.S. 433 (1939) while the decision did state the amendatory process was the "exclusive" province of Congress, no where in the ruling was there any mention of the amendatory convention nor was the language of Article V even quoted. As the Court only referred to Congress and thus that portion of Article V dealing with *congressional* amendatory proposals, it maintained the principle of separation of powers, in this instance the amendatory convention being autonomous from congressional control. Otherwise the Court certainly would have such judicial an intent clear.

In citing *Coleman*, in *Walker v. United States*, which was then reaffirmed in *Walker v. Members of Congress*, Judge Coughenour placed the convention process of amendment under Congress' exclusive control relying on that part of *Coleman* which states:

> "The Court here treats the amending process of the Constitution in some respects as subject to judicial construction, in others as subject to the final authority of the Congress. There is no disapproval of the conclusion arrived at in Dillon v. Gloss, that the Constitution impliedly requires that a properly submitted amendment must die unless ratified with a 'reasonable time.' Nor does the court now disapprove its prior assumption of power to make such a pronouncement. And it is not made clear that only Congress has constitutional power to determine if there is any such implication in Article V of the Constitution. On the other hand, the Court's opinion declares that Congress has the exclusive power to decide the 'political questions' of whether a State whose leg-

islature has once acted upon a proposed amendment may subsequently reverse its position, and whether, in the circumstances of such a case as this, an amendment is dead because an 'unreasonable 'time has elapsed. *Such division between the political and judicial branches of the government is made by Article V which grants power over the amending of the Constitution to Congress alone. Undivided control of that process has been given by the article exclusively and completely to Congress. The process itself is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control, or interference at any point.*

Since Congress has sole and complete control over the amending process, subject to no judicial review, the views of any court upon this process cannot be binding upon Congress, and insofar as Dillon v. Gloss, supra, attempts judicially to impose a limitation upon the right of Congress to determine final adoption of any amendment, it should be disapproved. If Congressional determination that an amendment has been completed and become a part of the Constitution is final and removed from examination by the courts, as the Court's present opinion recognizes, surely the steps leading to that condition must be subject to the scrutiny, control and appraisal of none save the Congress, the body having exclusive power to make that final determination.

Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon the exclusive power by this court or by the Kansas courts. Neither State nor Federal courts can review that power. Therefore, any judicial ex-

> pression amounting to more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority."

(*Coleman v. Miller*, 307 U.S. 433 (1939.) (Footnotes omitted.) (Emphasis added.)

Using such words as "exclusive," "completely" or "undivided" to describe congressional control of the Article V amendatory *process* i.e., the method whereby an amendment becomes part of the Constitution, as opposed to an amendment *proposal* submitted by Congress subservient to that process, the Court, as interpreted by Judge Coughenour recognizes no exceptions, such as the peremptory authority of the convention process as expressed in Federalist 85, or the states' role in that process. Until *Coleman*, Court rulings recognized two autonomous modes of amendment. (See above.) As interpreted by the district courts and appeals court, *Coleman* created a single mode, evidently intended to be the alpha and omega of national Government amendatory authority.

There is an obvious conflict between Federalist 85, representing the original intent of the Founders as to Congress' role in the convention amendatory process, which is Congress shall have "no discretion" and *Coleman*, which is Congress shall have "exclusive power." *Coleman* represents the "living tree" doctrine of constitutional law. Judge Coughenour faced the decision which constitutional doctrine "living tree," or "original intent" he should use to rule on the convention amendatory process. He chose "living tree." His choice simultaneously endorsed unilateral control of the amendatory process by Congress and congressional veto of the meaning, intent, and written language of a clause of the Constitution as intended by the Founders.

As *Coleman* did not specifically address the convention

amendatory process, Judge Coughenour was required extend *Coleman*, i.e., legally determine the convention process was under congressional control. In *Walker v. United States* the Government referred to *Coleman* as an "analogous" decision rather than precedent. Clearly, even the Government required a court ruling in order for that doctrine to be extended. Therefore, to extend *Coleman* to include the convention process, Judge Coughenour obviously was required to rule on the central question of congressional obligation. Moreover, several Court opinions favoring the convention amendatory process as autonomous of congressional dictate and obligating a call required nullification in order to prevent a convention call. (See ellipsis in *Walker v. United States*).

TABLE SUMMARIZING STATE APPLICATIONS FOR A CONVENTION TO PROPOSE AMENDMENTS

The following table presented under Rule 1006 Federal Rules of Civil Procedure summarizes states applying for a convention, the first year of application, and total number of applying states. Sources are:

ABA Constitutional Convention Report, August 1973;

A Lawful and Peaceful Revolution: Article V and Congress' Present Duty to Call a Convention for Proposing Amendments, Judge Bruce M. Van Sickle, Senior United States District Court Judge for the District of North Dakota, Hamline Law Review, Volume 14, Fall 1990;

1 Annuals of Congress 248 (J. Gales ed. 1789); Congressional Record, Volumes 33 (1899) to 135 (1989).

State	Date of First App.	Total Apps. Submitted	Total Applying States
VA	1789	17	1
RI	1790	6	2
TX	1899	17	3
MN	1901	7	4

State	Date of First App.	Total Apps. Submitted	Total Applying States
NE	1901	18	5
NV	1901	18	6
MI	1901	10	7
OR	1901	10	8
MT	1901	10	9
TN	1901	13	10
AR	1901	16	11
CO	1901	7	12
ID	1901	18	13
PA	1901	7	14
KY	1902	6	15
WI	1903	21	16
IL	1903	20	17
UT	1903	12	18
WA	1903	6	19
IA	1904	17	20
MO	1905	14	21
NY	1906	5	22
SD	1907	27	23
DE	1907	10	24
KS	1907	10	25
NJ	1907	9	26
LA	1907	26	27
IN	1907	14	28
NC	1907	5	29
OK	1908	17	30
ME	1911	4	31*
OH	1911	5	32**
VT	1912	2	33
SC	1916	11	34***
MA	1931	16	35
CA	1935	4	36
WY	1939	15	37

State	Date of First App.	Total Apps. Submitted	Total Applying States
MD	1939	6	38
NH	1943	9	39
FL	1943	19	40
AL	1943	15	41
CT	1949	5	42
NM	1952	5	43
GA	1952	20	44
AZ	1965	12	45
MS	1965	16	46
ND	1967	5	47
HI	1970	1	48
WV	1971	2	49
AK	1982	2	50
Total	----	567	----

* In 1911, there were 46 states in the Union. Two-thirds of 46 is 30.67. Under the terms of Article V, the two-thirds required threshold was reached with the application of Maine which became the thirty-first state to apply for a convention to propose amendments.

** In 1911, Ohio became the thirty-second state to apply for a convention to propose amendments. Two-thirds of 48 is 31.99. This means the two-thirds threshold for 48 states had been met even before two states, New Mexico and Arizona, were admitted to the Union the following year in 1912.

*** In 1916, the number of applying states reached 34 with the application of South Carolina. This number satisfied the two-thirds requirement for 50 states even though it would be 43 years before Alaska and Hawaii joined the Union. Since 1916, the number of applying states has continued to increase until, in 1982 with the application of Alaska, every state in the Union had applied at least once for a convention to propose amendments.

There is significance in these thresholds for the Court. As of 1911, under the terms of Article V, Congress was obligated was call a convention to propose amendments. At that time, the Court had already expressed in a ruling that Congress must call a convention. This ruling was ignored by Congress. Therefore, by this action, Congress claimed the right to veto clauses of the Constitution irrespective of any Supreme Court ruling.

SUMMARY OF MOST NUMEROUS APPLICATIONS FOR CONVENTION BY AMENDMENT SUBJECT

Even though the Constitution does require that the states apply for the same amendment subject when applying for an amendment convention, many of the applications do contain proposed amendment subjects. The following table summarizes those subjects and lists the states which have applied for each subject. Sources are:

ABA Constitutional Convention Report, August 1973;

A Lawful and Peaceful Revolution: Article V and Congress' Present Duty to Call a Convention for Proposing Amendments, Judge Bruce M. Van Sickle, Senior United States District Court Judge for the District of North Dakota, Hamline Law Review, Volume 14, Fall 1990;

1 Annuals of Congress 248 (J. Gales ed. 1789); Congressional Record, Volumes 33 (1899) to 135 (1989).

Repeal of Income Tax (39 States): Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, Wyoming.

Balanced Budget (38 states): Alabama, Alaska, Arizona,

Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, Wyoming.

Apportionment (36 states): Alabama, Arizona, Arkansas. Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, Wyoming.

Direct Election of Senators (31 states): Arkansas, Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin.

Right to Life (32 states): Alabama, Arkansas, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin.

Revenue Sharing (27 states): Colorado, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Virginia, Washington, West Virginia, Wisconsin.

Anti-Polygamy (Defense of Marriage) (26 states): Colo-

rado, Delaware, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin.